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In the Court of Claims of the United States.

OCTOBER TERM, 1918.

THE UNITED STATES OF AMERICA, Plaintiff in error, *v.* AUGUST FERGER, THOMAS M. Dugan, and Robert H. Rasch. | Nos. 776 and 777.

ERROR TO [redacted] *THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.*

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The defendants were indicted in the District Court for the Southern District of Ohio. In case No. 1198 the defendants were charged in the odd-numbered counts with forging, with intent to defraud, certain bills of lading purporting to be issued by the Cincinnati, Hamilton & Dayton Railway Co., at Fountaintown, Ind., and to represent a shipment of goods from W. D. Springer consigned to his own order at Cincinnati, Ohio, with instructions to notify Ferger Grain Co. of Cincinnati, Ohio. In the even-numbered counts they were charged with having uttered as genuine, with intent to defraud, the forged bills of lading previously described, each containing a false statement as to

the receipt of 80,000 pounds of corn, and with having negotiated them for value to the Second National Bank of Cincinnati.

In case No. 1199 the defendants were indicted for conspiring to commit an offense against the United States in that they conspired to do the various acts with which they were charged in case No. 1198. It was charged that to effect the object of the conspiracy they negotiated and delivered these forged bills of lading to the Second National Bank of Cincinnati as collateral security for a loan of $22,000 to the Ferger Grain Co.

The bills of lading were set forth in the indictments. They were of the standard form approved by the Interstate Commerce Commission (Order 787, June 27, 1908). It was agreed by counsel below, and it has been stipulated here that the bills of lading were fictitious in that there was no actual consignor or consignee and that they did not relate to any shipment actually made or contemplated.

The indictments were based upon section 41 of the act relating to bills of lading in interstate and foreign commerce, approved August 29, 1916 (39 Stat. 538) sometimes called the Pomerene Act.[1] This section reads:

> That any person who, knowingly or with intent to defraud, falsely makes, alters, forges,

[1] The statute was based upon the uniform Bills of Lading Act adopted by a number of the States. It recognizes the familiar distinction between "straight" and "order" bills and undertakes to make the latter fully negotiable. It makes various provisions for the protection of those dealing with bills of lading, and regulates in numerous ways the obligations and rights resulting from the issue of or dealing in such bills. *Inter alia* the

counterfeits, prints, or photographs any bill of lading purporting to represent goods received for shipment among the several States or with foreign nations, or with like intent utters or publishes as true and genuine any such falsely altered, forged, counterfeited, falsely printed, or photographed bill of lading, knowing it to be falsely altered, forged, counterfeited, falsely printed or photographed, or aids in making, altering, forging, counterfeiting, printing or photographing, or uttering or publishing the same, or issues or aids in issuing or procuring the issue of, or negotiates or transfers for value a bill which contains a false statement as to the receipt of the goods, or as to any other matter, or who with intent to defraud, violates, or fails to comply with, or aids in any violation of, or failure to comply with any provision of this Act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding $5,000, or both.

The defendants filed motions to quash and demurrers to the indictments. The district judge dismissed the indictments on the ground that Congress was without power to make the acts charged in these cases an offense.

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statute (sec. 22) makes the carrier liable upon a bill issued by an agent having apparent authority although no goods actually are received by it. This provision was law in many jurisdictions even before the passage of the State uniform bills of lading acts but this court had refused to accept the principle.

ARGUMENT.

I.

Congress Can Punish the Forgery of Interstate Bills of Lading in Order to Protect an Instrumentality of Interstate Commerce.

A. Bills of Lading are Instrumentalities of Interstate Commerce.

As this Court has said, interstate commerce, at least when the commerce is transportation, is an act. It is an act taking place in the practical business world and according to business methods. Being an act performed by the labor of men with the help of things the men or things engaged in such performance are the agents or instrumentalities of commerce. The agents or instrumentalities are not only those involved in the physical movement incident to transportation, they include those men and things required by law or by business methods in order to effect transportation. The ticket entitling the purchaser to transportation is an instrumentality of interstate commerce as is the agent who sells the ticket. The bills of lading issued by carriers considered in no broader aspects than their character as receipts for goods shipped are likewise instrumentalities of interstate commerce. From the standpoint of practical railroad administration they are as necessary to the movement of goods as are the cars and engines employed to haul such goods.

But bills of lading, and especially those given negotiable form, are much more than mere receipts for goods shipped. They also embody the contract

of shipment made between the shipper and carrier, and they serve as the basis for commercial dealings of the greatest magnitude and consequence. The use of bills of lading with drafts attached is one of the familiar phenomena of commerce. Its convenience and desirability has recently been noticed by this Court. *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139, 149. A vast volume of our interstate and foreign commerce moves under such bills.[1]

The use of bills of lading in interstate commerce is not only a practical necessity but is also required by law. On June 29, 1906, Congress passed the Carmack amendment to the interstate commerce act making it obligatory upon every carrier subject to that act to issue a bill of lading for every interstate shipment of goods. (34 Stat. 595). This amendment gives the force of law to the character of interstate bills of lading as instrumentalities of interstate commerce. They had, however, long been so recognized. *Almy* v. *California*, 24 How. 169; *Fairbank* v. *United States*, 181 U. S. 283, 293–4; Comp. *Thames & Mersey Ins. Co.* v. *United States*, 237 U. S. 19, 26.

By the Carmack amendment and by later amendments to it (act of Mar. 4, 1915, sec. 1, 38 Stat. 1196; and act of Aug. 9, 1916, c. 301, 39 Stat. 441) Congress has undertaken to prescribe in various ways the

[1] At the hearings upon this bill, it was said by well-informed witnesses that merchandise valued at more than $25,000,000,000 moved annually under "order" bills and that advances against them reached annual totals exceeding $5,000,000,000. Ninety-nine per cent of these shipments were in interstate and foreign commerce. (Hearings, Senate Com. on Int. Com., 64th Cong., 1st sess., Rep. 149, pp. 1, 2.)

liability assumed by carriers for goods lost in the course of an interstate shipment.

This Court has held that Congress has power thus to regulate the mutual obligations of shipper and carrier. (*Atlantic Coast Line Co.* v. *Riverside Mills*, 219 U. S. 186.) The bill of lading is the document in which these obligations are embodied. Congress, in other words, carries out a part of its regulatory powers through the medium of bills of lading. They are therefore instrumentalities of interstate commerce also in their aspect as instruments through which valid regulations of such commerce are effected.

B. Congress Can Protect Instrumentalities of Interstate Commerce.

In *Welton* v. *Missouri*, 91 U. S. 275, this Court, speaking of the power to regulate commerce, said (p. 280): "The power to regulate it embraces all the instruments by which such commerce may be conducted."

The grounds for this power of Congress to protect instrumentalities of interstate commerce are obvious. Commerce does not function of itself, but through agents and instrumentalities. A breakdown of the agents or instrumentalities means a breakdown of commerce. To protect commerce, therefore, it is necessary to protect its agents and instrumentalities.

There are many instances in which this Court has sustained such an exercise of congressional authority. *Northern Pacific Railway* v. *State of Washington*, 222 U. S. 370, sustained the power of Congress to regulate

the number of consecutive hours of service which members of a train crew might be employed. *Second Employers' Liability Cases*, 223 U. S. 1, settled the right of Congress to fix the liability of the carrier for injuries sustained by employees engaged in interstate commerce. The act was sustained as a measure conducing to the safety of agents of interstate commerce, namely, employees of the carriers engaged in such commerce. The validity of the safety-appliance acts as applied to interstate commerce seems never to have been questioned. (*Johnson* v. *Southern Pacific Railway*, 196 U. S. 1; *Schlemmer* v. *B. R. & R. Ry. Co.* 205 U. S. 1; *St. Louis, I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281.) Such legislation is essentially protective since by the regulation of certain appliances the entire physical property engaged in transportation is safeguarded.

C. Congress can Regulate or Prohibit Things Dangerous to Interstate Commerce which are not Themselves a Part of Such Commerce.

The court below adopted the view that acts which do not themselves involve interstate commerce are not within the purview of the commerce clause. But the source or nature of the act regulated under this clause is immaterial if in fact it affects or burdens interstate commerce. This principle has been applied by this Court to a variety of circumstances where Congress has regulated or prohibited something which, while itself outside the scope of interstate commerce, might affect such commerce injuriously.

In *Second Employers' Liability Cases, supra,* the Court noted the objection that was made that although Congress has power to regulate all liability of the carrier for injuries sustained by one employee through the negligence of another where both are engaged in interstate commerce, that power does not embrace instances where the negligent employee is engaged in intrastate commerce. Mr. Justice Van Devanter disposed of this by remarking (p. 51):

> But this is a mistaken theory, in that it treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power.

The act which was upheld in *Southern Railway Company* v. *United States,* 222 U. S. 20, prescribed certain safety appliances to be used on all locomotives, cars, and similar vehicles employed in both interstate and intrastate commerce on railroads engaged in interstate commerce. The Court said that the test to be applied in determining constitutionality was whether there was such a close or direct relation between the two classes of traffic that the safety of interstate commerce would be promoted in a real or substantial sense by applying the requirements of the act to vehicles in intrastate commerce. Referring to the power of Congress under the commerce clause to secure the safety of interstate commerce and of those engaged in it, this Court said (p. 27):

> it is no objection to such an exertion of this power that the dangers intended to be avoided

arise, in whole or in part, out of matters connected with intrastate commerce.

The Federal employers' liability law was considered in *Illinois Central Railroad* v. *Behrens*, 233 U. S. 473. It was decided that the law was drawn so that it applied only to employees who at the time they were injured were engaged in interstate commerce. The court, however, said (p. 477):

> Considering * * * the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was interstate or intrastate commerce.

In *Houston & Texas Railway* v. *United States*, 234 U. S. 342, it was decided that Congress could regulate wholly intrastate rates established by the authority of a State where the effect of such rates was to cause a discrimination against interstate commerce. Mr. Justice Hughes, after reviewing some of the prior cases, states (p. 353):

> This is not to say that Congress possesses the authority to regulate the internal commerce of a State, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.

A distinction might be attempted between the regulations thus sustained by this Court and the present case in that all these regulations concerned commerce, even if not interstate commerce, while the fraud here penalized did not itself constitute commerce. But intrastate commerce, as such, is as much beyond the authority of Congress to regulate as is fraud, as such. It is clear that the basis of authority to regulate is the effect of the act regulated, not its source.

D. Punishment of Forgery is a Valid Method of Protecting Interstate Bills of Lading as an Instrumentality of Interstate Commerce.

The value of a document of title depends upon its genuineness. The value of any such document is depreciated in proportion to the probability of its being forged. In the case of bills of lading possible forgery is a direct burden upon their use as an instrumentality of commerce. If the consignee to whom has been forwarded an interstate bill of lading has reason to doubt its genuineness he may refuse, to accept it altogether or, if he takes time to investigate, delay results. The practice of forging interstate bills of lading threatens their use as a method for transferring title and the right of possession to goods shipped in interstate commerce, and obstructs their use as an instrumentality of such commerce. Congress therefore has power to punish their forgery in order to protect this instrumentality of commerce.

The existence of State laws punishing forgery is no bar to the action of Congress in supplementing such

laws by criminal sanctions of its own. (*Second Employers' Liability Cases*, 223 U. S. 1, 51.)

In fact, State laws have proved an insufficient protection. When the bill for a Federal bills of lading act (here in question) was before the House Committee on Interstate Commerce, it was testified that although one Knight had obtained advances on the security of forged interstate bills of lading over a period of five years and although he had about five million dollars worth of bills outstanding on which no goods had been shipped when the bubble burst he had never been indicted in the State in which he lived. He had bought more cotton than other dealers, he had paid better prices and the loss caused by his frauds had fallen on foreign banks, so that, as was testified, local conditions were deemed to be such as to render prosecution futile. Since Knight had discounted his drafts at local banks he had been acquitted of the only Federal charge which could be brought against him, use of the mails with intent to defraud. (Hearings, House Committee Interstate Commerce, Senate bill 19, 64th Cong., 1st sess., pp. 17, 18.)

This Court has recognized that punishment of forgery is a valid method of protecting documents of title. In *United States* v. *Arjona*, 120 U. S. 479, this court had before it an indictment charging the defendant with forging certain bank notes issued by the authority of a state of a foreign Government in violation of sections 156 and 158 of the Criminal Code. The Court held that Congress could punish

the offense as one "against the law of nations" within the meaning of Article I, section 8, clause 10 of the Constitution. It declared that if foreign securities could be forged with impunity a great wrong would be done foreign Governments, for "any uncertainty about the genuineness of the security necessarily depreciates its value as a merchantable commodity." International obligations may require a government "to provide for the punishment of such an offense, and thus secure the restraining influences of a fear of the consequences of wrongdoing."

Congress has passed various laws punishing forgery in order to protect instrumentalities employed by it in the furtherance of powers which the Constitution has committed to Congress. Clause 7 of section 8 of Article I gives Congress power "to establish post offices and post roads" and Congress has made it a crime to forge or counterfeit postage stamps. (Criminal Code, sec. 219.) Clause 1 gives Congress the power "to lay and collect taxes, duties, imposts, and excises." The act of March 3, 1897, section 7 (29 Stat. 628), makes it a crime to forge or counterfeit any stamp used in that act, which taxes bottled spirits in bond. Revised Statutes, section 3446, penalizes the making, using, or selling of false revenue stamps for fermented liquors, and similar provisions as to revenue stamps for playing cards are found in the act of August 27, 1894, section 42 (28 Stat. 561). The courts have never had occasion to pass upon the question of the constitutionality of these laws. It has never been questioned.

It can not be argued at the present time that the power of Congress over interstate commerce is any less complete than its power to tax or to maintain a postal system. Congress may even create an agent for carrying on interstate commerce. The Pacific Railroad Companies were so incorporated. (*Pacific Railroad Removal Cases*, 115 U. S. 1; *California* v. *Pacific Railroad*, 127 U. S. 1.) Upon ordinary agency principles the use which such an agent might make of bills of lading as an instrumentality of commerce would seem to be the use of the Government itself. It is not necessary, however, to go so far to show the analogy to the present case of the legislation penalizing forgery of postage and revenue stamps. It is well settled that the power of protecting commerce exists and ordinarily is exercised when the commerce is conducted, not by the Government, but by the general public.

II.

Congress Can Punish the Negotiation of Fraudulent Interstate Bills of Lading as a Direct Measure of Protection to Interstate Commerce.

A. The Negotiation of Fradulent Interstate Bills of Lading is a Direct and Substantial Danger to Interstate Commerce.

As has been said, it is a matter of common knowledge that the movement of a large part of interstate commerce depends upon the use of bills of lading as collateral security in obtaining advances. When a dealer in the interior of the country ships grain or cotton to the seacoast or to a large railroad center

he draws a sight draft, accompanied by a bill of lading, on the consignee and gets the draft discounted at a local bank, upon the security of the attached bill of lading. If payment for goods so shipped can not be obtained until they reach their destination, are examined and the amount ascertained and remittance sent back, the ordinary dealer who has car after car in transit can not finance his operations and must go out of business.

The extent of the use of interstate bills of lading for these vital purposes of interstate commerce has already been noted as running annually into billions of dollars.

Experience has shown the extent to which the negotiation of false bills of lading may be used as a means to defraud. The extensive Knight-Yancy frauds have been referred to. Other frauds aggregating, according to the testimony, some $6,000,000 were perpetrated by Le More & Co., of New Orleans, by means of so-called "accommodation" bills of lading obtained from steamship companies shipping goods to Europe. (Hearings before House Committee on Interstate Commerce, Senate bill 19, 64th Congress, 1st sess., pp. 17 and 18.)

It necessarily follows that such fraudulent negotiations tend to make banks distrustful of bills of lading and unwilling to advance money upon them, and that interstate commerce is thereby burdened and obstructed.

It was to meet this danger to the commerce of the country that Congress passed the act of August 29,

1916, and incorporated in it criminal provisions against the negotiation of fraudulent bills of lading. The act had a long legislative history. Its main points were included in a bill introduced in the Fifty-eighth and Fifty-ninth Congresses. In the Sixty-first Congress a Federal bill of lading act was introduced in the House, but the Pomerene bill, which later became law, was written and passed by the Senate. It came to the House Committee on Interstate Commerce after adjournment for the session, and the European war prevented its consideration in the Sixty-third Congress. (Hearings before House Committee on Interstate Commerce, Senate bill 19, 64th Cong., 1st sess., pp. 8 and 9.)

The Pomerene bill received wide backing. The Chamber of Commerce of the United States appointed a special committee for the sole purpose of advocating the passage of the bill. An attorney representing the National Grain Dealers' Association and the chairman of the Federal legislative committee of the American Bankers' Association appeared in support of the bill. The National Canners' Association presented a statement favoring the bill. The bill was also approved by the American Bar Association at its annual meeting in August, 1915. (Hearings, House Committee on Interstate Commerce, Senate bill 19, 64th Cong., 1st sess., pp. 12, 29, 51.)

The danger to interstate commerce caused by the negotiation of false bills of lading is shown by the history of the times, by the repeated efforts to enact

legislation to meet the danger, and by the approval which was given an act aimed at the danger by leading commercial, banking, and legal organizations of the country. It was clearly a danger which it was competent for Congress to meet by measures of prevention.

B. Congress Can Regulate Acts Which Directly and Substantially Affect Interstate Commerce.

It has been pointed out that the relation between interstate bills of lading and interstate commerce is direct. It is hardly necessary, therefore, to contend that in the interest of general trade conditions Congress could protect negotiable instruments even where this direct relation to interstate commerce did not exist. Such a suggestion was, however, made by this Court in *United States* v. *Arjona*, 120 U. S. 479, 487–488, in connection with a statute penalizing the forgery of foreign securities:

> Again, our own people may be dealers at home in the public or *quasi* public securities of a foreign government, or of foreign banks or corporations, brought here in the course of our commerce with foreign nations, or sent here from abroad for sale in the money markets of this country. As such they enter into and form part of the foreign commerce of the country. If such securities can be counterfeited here with impunity, our own people may be made to suffer by a wrong done which affects a business that has been expressly placed by the Constitution under the protection of the government of the United States.

It has been repeatedly decided in cases arising under the Sherman Act that the power to regulate interstate commerce is not limited in application to cases where a particular transaction involving interstate carriage can be identified as affected adversely. For example, in *Northern Securities Company* v. *United States*, 193 U. S. 197, this Court held that a contract by which the stockholders of two competing corporations formed a holding corporation was a contract in restraint of trade and in violation of the Sherman Act. The case decided that Congress can declare that interstate commerce thrives best under conditions of free competition and, to bring about this result, can prohibit whatever limits competition. It established the power of Congress to regulate in the interest of interstate commerce acts which were not themselves a part of interstate commerce and reaffirmed the wide discretion which Congress can exercise in determining what acts are injurious to interstate commerce, and therefore to be prohibited.

The statute sustained in the *Second Employers' Liability Cases, supra*, made various departures from the common law in fixing the liability of carriers for injuries sustained by their employees while engaged in interstate commerce. It abolished the so-called fellow-servant rule, substituted a rule of comparative negligence for that of contributory negligence, and abolished the doctrine of assumption of risk where the employer's violation of a statute enacted for the safety of his employees contributed to the

injury. By throwing greater pecuniary liability upon the carrier for injuries sustained by his employees while engaged in interstate commerce the law tended to decrease the number of such injuries and to bring about favorable conditions under which interstate commerce would be conducted, and, upon this ground, it was sustained.

Lack of public faith in the security of interstate bills of lading is a condition as unfavorable to interstate commerce as lack of free competition among producers or manufacturers or transportation companies. If Congress has power to guard against the latter condition it can guard against the former.

Likewise a measure aimed at protecting public confidence in the security of interstate bills of lading promotes the movement of goods in interstate commerce as directly as measures tending to increase the safety of interstate employees safeguard transportation and interstate commerce. The source of authority in both cases is the power to pass legislation in aid of interstate commerce.

In conclusion we may refer to the statement by Mr. Justice Hughes in *Houston & Texas Railway* v. *United States*, 234 U. S. 342, 351, summarizing the protective power of Congress over interstate commerce:

> Congress is empowered to regulate—that is, to provide the law for the government of interstate commerce; to enact "all appropriate legislation" for its "protection and advancement" (*The Daniel Ball*, 10 Wall.

557, 564); to adopt measures "to promote its growth and insure its safety" (*County of Mobile* v. *Kimball, supra*); "to foster, protect, control and restrain" (*Second Employers' Liability Cases, supra*).

CONCLUSION.

The judgment of the District Court of the United States for the Southern District of Ohio should be reversed and judgment should be entered dismissing the defendants' motions to quash the indictments and overruling the defendants' demurrers to the indictments.

Respectfully,

LaRue Brown,
Assistant Attorney General.
Charles H. Weston,
Attorney.

April, 1919.

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APR 14 1919
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1918.

NOS. 776 AND 777.

UNITED STATES OF AMERICA, *Plaintiff in Error,*
vs.
AUGUST FERGER, ET AL., *Defendants in Error.*

BRIEF OF FRANCIS B. JAMES AS AMICUS CURIAE ON BEHALF OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE.

FRANCIS B. JAMES,
Amicus Curiae on Behalf of the National Industrial Traffic League.
805-808 Westory Bldg.,
Washington, D. C.

April 5, 1919.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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BRIEF OF FRANCIS B. JAMES AS AMICUS CURIAE ON BEHALF OF THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE.

I.

WHAT THIS CASE IS ABOUT.

August Ferger and his co-defendants were indicted for forging and uttering and conspiring so to do order-notify bills of lading purporting to cover interstate shipments. No goods were ever tendered to the carrier for shipment. The documents under which August Ferger and his

co-defendants were indicted were not issued by the Cincinnati, Hamilton and Dayton Railway Company which purported to issue same but instead were purely fictitious documents prepared and signed in the name of W. E. Shelden, agent on behalf of the railroad corporation by August Ferger and his co-defendants. They also forged the name of W. D. Springer thereto as shipper.

By the terms of the forged bills of lading, W. D. Springer was both consignor and consignee. The Ferger Grain Company was a party-notify. August Ferger and his co-defendants duly forged the name of W. D. Springer on said bills of lading as the first indorsement. They also put thereon the genuine signature of the Ferger Grain Company by Thomas M. Dugan, Secretary, as a further indorsement thereon. What is said as to one of the forged bills of lading is true as to all other bills of lading.

The United States Grand Jury for the Southern District of Ohio returned a true bill of indictment against August Ferger and his co-defendants for said forgeries under the provisions of Section 41 of the Pomerene Bill of Lading Law of August 29, 1916 (39 Stat., 538), which became effective January 1, 1917, said Act being entitled "An Act relating to Bills of Lading in Interstate and Foreign Commerce."

August Ferger and his co-defendants duly filed a demurrer to the indictment on the ground that no offense was stated. The District Judge sustained a demurrer to the indictment on the ground that Congress was without jurisdiction to prescribe a penalty under Section 41 of said Pomerene Bill of Lading Act as to a character of offense set forth in the indictment and that said Section 41 of said Act was as to the character of offense set forth in the indictment beyond the power of Congress and therefore unconstitutional, null and void.

II.

The Mercantile or Economic Conception of a Bill of Lading.

The mercantile or economic conception of a bill of lading is, that in case of a straight bill of lading the consignee has a right to rely upon the representations therein contained that the carrier has received the goods and protected in advancing the purchase price in reliance thereon, and in case of an order-notify bill of lading that such latter document is fully negotiable and that the *bona fide* holder for value is entitled to enforce the same.

It was the ingenuity of merchants out of which has grown the whole body of the law merchant, including therein the doctrine of negotiability in antithesis to the common law. In the first place bills of exchange were treated by the merchants as negotiable, and this conception was approved by the courts, and thereby bills of exchange became legally negotiable. The next step on the part of the merchants was to treat promissory notes as negotiable, but this was denied by Lord Chief Justice Holt in the celebrated case of Clerk vs. Martin (2 Lord Raymond, 757). The merchants not being successful in having the courts recognize the negotiability of promissory notes appealed to the English Parliament, which body by the Act of 3 & 4 ANNE, Chapter 9, made promissory notes negotiable.

Checks and certificates of deposit were then treated by the merchants as negotiable and this usage was recognized by the courts. Promissory notes under seal were next recognized by the courts as negotiable. By mercantile usage scrip was regarded as negotiable and this usage and custom of merchants in regarding scrip as negotiable was recognized by the courts in Goodwin vs. Robarts (1875), L. R. 10 Ex. 337, wherein Lord Chief Justice Cockburn said:

"The usage of the money market has solved the question whether scrip should be considered security for and the representative of money by treating it as such. Universality of a usage voluntarily adopted between buyers and sellers is conclusive proof of its being in accordance with public convenience; and there can be no doubt that by holding this species of security to be incapable of being transferred by delivery and as requiring some more cumbrous method of assignment we should materially hamper the transactions of the money market with respect to it and cause great public inconvenience. No doubt there is an evil arising from the facility of transferring by delivery, namely, that it occasionally gives rise to the theft or misappropriation of the security to the loss of the true owner. But this is an evil common to the whole body of negotiable securities. * * * It is one which is counterbalanced by the general convenience arising from facility of transfer or the usage would never have become general to make scrip available to bearer and to treat it as transferable by delivery. * * * Lastly, it is to be observed that the tendency of the courts * * * has been to give effect to mercantile usage in respect to securities for money."

It has been the thought of some that the growth of the law merchant had come to an end with the death of Lord Mansfield, but we thus see that Lord Chief Justice Cockburn treated the law merchant as an ever living and growing body of usages and customs which should be given legal effect by judicial decisions. The same thought is found in the following English cases:

Exploration Co. vs. London Trading Bank [1898], 2 Q. B., 658; and
Edelstein vs. Schuler [1902], L. R., 2 K. B., 144, at p. 155.

Edelstein vs. Schuler & Co., *supra,* was an action in trover to recover value of certain bearer bonds alleged to have

been converted by the defendants to their own use. The transaction was as follows: A clerk stole certain debenture bonds, expressed to be payable to bearer. For purpose of selling the bonds, the clerk employed a broker named Bradford, who instructed defendants, brokers on the London Stock Exchange. The defendants in good faith entered into contracts for the sale of the bonds to jobbers. The broker employed by the clerk sent the bonds to the defendants who handed them to the jobbers and remitted the price received from the jobbers. On trial it was proved that by usage of the mercantile world and of the Stock Exchange, bonds of the kind in question were treated as negotiable instruments transferable by mere delivery.

In discussing the issues, Justice Bigham stated (at pp. 154, 155, and 156) as follows:

> "* * * It (the law merchant) is, to use the words of Cockburn, C. J., in *Goodwin vs. Robarts*, L. R. 10 Ex. at p. 346, capable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce, the effect of which is that it approves and adopts from time to time those usages of merchants which are found necessary for the convenience of the trade; our common law, of which the law merchant is but a branch, has in the hands of the judges the same facility for adapting itself to the changing needs of the general public; principles do not alter, but old rules of applying them change, and new rules spring into existence. Thus it has been found convenient to treat securities like those in question in this action as negotiable, and courts of law, recognizing the wisdom of the usage, have incorporated it in what is called the law merchant, and have made it part of the common law of the country. In my opinion the time has passed when the negotiability of bearer bonds, whether Government bonds or trading bonds, foreign or English, can be called in question in our courts. The existence of the usage has

> been so often proved and its convenience is so obvious that it must be taken now to be part of the law. * * * I think that it is no longer necessary to tender evidence in support of the fact that such bonds are negotiable, and that courts of law ought to take judicial notice of it."

Sir Frederick Pollock, in his lecture on the Expansion of the Common Law, delivered on the occasion of a visit to America in 1903, said (at p. 119):

> "It is important to observe that the Law Merchant was not incorporated into our systems, as some have contended, as a fixed body of rules incapable of addition. It is still in fact *a living body of customs* and English decisions have quite lately recognized this fact."

Bower, in his Dictionary of Economic Terms, defines "economics" as follows:

> "The science which studies society from the side of the agricultural, industrial and commercial dealings, habits and customs of its members."

In respect to bills of lading we find much in the writings of the economists duly recording the customs and usages of merchants in reference to bills of lading.

President Hadley of Yale University, in his classic on "Railroad Transportation" well said (at pp. 18 and 19):

> "We no longer produce for the home market, but for the world's markets. It is by the world's supply and demand that prices are made. *The development of transportation has been the main instrument of this change. It has gone hand in hand with the extension of the credit system. Each has supplemented the*

other.' The bill of lading is made to serve the same purpose as the bill of exchange." (Italics mine.)

Logan McPherson, in his "Railroad Freight Rates in Relation to the Industry and Commerce of the United States," after classifying bills of lading as commercial paper, says (at p. 190):

> *"The bill of lading is an instrument for facilitating commerce, the importance of which is not generally known.* (Italics mine.) It is not only a certificate that merchandise is in transit, but a first lien upon that merchandise in a way of title to ownership, and as fulfilling this function, *negotiable.* (Italics mine.) For example, a grain dealer buying a carload of wheat at the Western field may and in the vast majority of cases does deposit the bill of lading covering that car in a bank as security for a loan to its value. If that car goes through to a port where it is sold for export the loan may not be paid and the bill of lading lifted until the grain is transferred from the car to the vessel. There is a similar procedure in the case of other commodities with bills of lading covering raw material to the factory and finished products from the factory. *The bill of lading thus contributes to that fluidity of the circulating medium, that celerity in the transfer of merchandise, which are striking achievements and essential requirements of current civilization."* (Italics mine.)

Mr. Prendergast (former Comptroller of the City of New York), in his work on "Credit and Its Uses," said (at p. 42):

> "A merchant having purchased a bill of goods on a specified term of credit, gives to the seller a bill of exchange drawn on himself, representing the amount of the invoice. The seller needing money for his own

business passes this bill of exchange, with his endorsement thereon, to another from whom he has made a purchase, or to whom he may be in debt for any other reason. The third person to whom the bill of exchange is given, passes it on again in liquidation of an indebtedness of his own, and so on. In this way that bill of exchange may serve in the effacement of many different accounts and return to the drawer literally covered with endorsements. What is true as to the function of the medium of exchange which the particular bill referred to has discharged may be equally true of many other forms of credit instruments which may be called to mind. Promissory notes, drafts, checks, *bills of lading* (italics mine) *and warehouse receipts are all credit instruments which can be used as mediums of exchange or substitutes for money*" (italics mine).

Mr. Albert Strauss, of Messrs. J. & W. Seligman & Co., in an address on the "Currency Problem" said (at p. 76):

"The English buyer arranges with his banker to accept the drafts of the American cotton dealer and notifies the American dealer to draw his sixty-day bill on the London bank *with shipping documents attached* (italics mine). The American cotton dealer borrows from his local bank to buy cotton from the farmer whom he pays in cash. When he has gathered enough cotton for shipment, he ships on *through bills of lading* (italics mine) from his Southern home direct to Liverpool; *these bills of lading* (italics mine) he attaches to his sixty-day draft on London and the London draft with his documents he attaches to a draft on his New York agent. With this New York draft he repays the local bank. The New York agent in turn sells this sixty-day bill on London to a New York banker, and with the proceeds meets the cotton dealer's draft on him. On the other hand, the exchange banker sends the sixty-day bill to London for discount and against the proceeds draws a demand bill on London."

In the Life Story of J. P. Morgan, by Carl Hovey (at p. 41), the same thought as expressed by Mr. Strauss is given, as follows:

> "When we export cotton, a credit is opened with the English buyer, who arranges with his banker to accept drafts of the American dealer, and notifies the American cotton dealer to draw his sixty-day bill on the London bank *with shipping documents attached* (italics mine). The New York banker buys this bill of the dealer, thus supplying him, without trouble and at a small charge, the necessary cash to pay the farmer who raised the cotton. The dealer in exchange brings together a customer in London, or it may be in Batavia, Siam or the coast of Africa, and a seller in the United States. The two practically stand in front of his desk and receive what is justly due them, although they may actually be 10,000 miles apart."

Dondlinger in his book on "Wheat" said (at pp. 227-8) as follows:

> "The large money centers are not as great a factor in the moving of the wheat crop as they were at an earlier date, for to a large extent the rural sections now do their own banking. The banking power has grown much faster than the increasing money requirements for moving crops. In 1890 the banking power of the chief grain States was to the money power required to move the grain crop as 4 to 6, and a decade later the ratio was as 7 to 6. The grain growing region now has sufficient capital to move the cereals from first hands and to start them well on their way through the commercial channels. A dealer furnishing money for about 175 country elevators in Minnesota and the Dakotas sends out $500 to $1,000 to each elevator, making from $100,000 to $150,000 sent out the first day. Cars are not obtained on this day, and perhaps 50,000 to 100,000 bushels are purchased. A sort of paymaster is located in the elevator towns, and these

keep the principal informed as to the amount of wheat purchased daily, and as to the amount of cash that will be required the next day. Much of this cash must usually be borrowed, but warehouse receipts for grain already in elevators are good security on which an amount of money close to the cash price of the wheat can be borrowed from the country banker. There must be a carload of the same grade of grain before shipment can be made. When the grain does begin to move it takes several days for it to get to market, and five or six days' receipts are often on hand before cash is realized. As soon as a car is loaded, the elevator man draws a sight draft on the commission house at the primary market for the amount that he borrowed from the country banker, *attaches the bill of lading* (italics mine), and deposits the draft in the country bank as a cash item. Cables are frequently sent at night to every market of the world in order to sell wheat. What can not be sold must be held, and future sales upon the speculative markets can be made as an insurance against loss from price fluctuations.

"The country banker sends the draft to his correspondent at the market, where collection is made. As soon as the wheat reaches the terminal warehouse, it is again available for a loan close to its market value. If the terminal factor is an exporter, *he also attaches bills of lading to a draft drawn against the shipment* (italics mine), and his banker accepts this draft as cash at current exchange rates, which include interest on the money until the draft is paid. Outside of the money used by the railroads, it requires about $500,000,000 to move grain crops. If the farmers do not wish to sell their wheat at once, they can place it in the elevator and receive a receipt on which they can borrow 90 per cent of its value from the banks."

These same economic practices have been noticed by the courts:

Ratzer vs. Burlington, 64 Minn., 245;
Wichita Savings Bank vs. A. T. & S. F. R. R. Co., 20 Kansas, 519.

It will thus be seen that by the usage and custom of merchants the order-notify bill of lading was considered in the truest sense a species of "commodity currency," and fully negotiable.

To the merchant the order-notify bill of lading was just as truly negotiable as a bill of exchange.

To the merchant the straight bill of lading was not in the full sense negotiable, but by mercantile usage the straight bill of lading was treated as a receipt for the goods, a contract of carriage and a direct representation by the carrier that it had received the goods and such a representation upon which the consignee had a right to rely and settle with his consignor for the invoice price of the goods. By mercantile usage and custom the straight bill of lading was more than a receipt and more than a contract of carriage—it carried with it the mercantile, commercial or economic element of a representation of receipt of goods conclusive upon the carrier issuing the same and of a character to warrant the consignee of such straight bill of lading in paying the invoice price based in the indisputable representation contained in the bill of lading that the carrier had received the goods from the consignor and would deliver the same to the consignee. The straight bill of lading was thus treated in a sense as *quasi* negotiable.

III.

How the Mercantile or Economic Conception Was Converted Into the Present Legal Conception as Contained in the Pomerene Bill of Lading Law of August 29, 1916.

In view of the fact that the Supreme Court of the United States in the case of Shaw vs. Railroad Company (101 U. S., 557), refused to recognize the usage and custom of merchants that an order-notify bill of lading was negotiable

and denied that the statutes of Missouri and Pennsylvania were sufficiently worded to make the same negotiable, led to a long agitation among the merchants to secure legislation drawn with such clearness that there would be no doubt that our legislative bodies intended to make the same fully negotiable. This culminated in the Commissioners on Uniform State Laws in National Conference taking up the matter in 1905 through its Committee on Commercial Law. This Committee held public meetings and its discussions were participated in by representatives of the bankers, shippers and receivers of freight and the carriers. Numerous tentative drafts were prepared and circulated among the shippers and receivers of freight, the bankers and the railroads. As a result all of the interests which had participated in the discussions agreed to a code upon the subject, known as "An Act to Make Uniform the Law of Bills of Lading." This code was duly endorsed by the Commissioners on Uniform State Laws in National Conference at the annual meeting held at the Wayne County Court House at Detroit, Michigan, on August 19, 20, 21 and 23, 1909.

See "American Uniform Commercial Acts," 14-19; 43-44; 68-69, and 213-228.

This uniform State act has now been enacted by a number of the States and in view of opinions given the merchants prior to the decision of the Supreme Court of the United States in the case of Adams Express Co. vs. Croninger (226 U. S., 491), and which opinions were confirmed by that decision and subsequently by the decision in the cases of Atchison, Topeka & Santa Fe Railway Company vs. Harold (June 5, 1916), 241 U. S., 371; and Missouri, Kansas & Texas Ry. Co. vs. Sealy (January 7, 1919), 248 U. S., 363, the merchants were advised that in view of the Carmack amendment to the Hepburn Act of June 29, 1906 (34 Stat., 595), and the further legislation

on bills of lading by the Act of June 18, 1910 (36 Stat., 546), amending the Interstate Commerce Act, that this uniform State Code or Bills of Lading would not be applicable to interstate commerce. This led to the introduction of the Uniform State Act as a Federal Act in the United States Senate by Senator Pomerene in 1912. The Pomerene Act was in substance the same as the uniform State Act, with some changes. It unanimously passed the Senate in 1912, 1914 and 1916 and only failed in 1912 and 1914 by reason of the failure of the House to act thereon. The matter lagged in the House and the bill was brought to the attention of the President in a conference held with the President in the White House April 12, 1916. As a result of this conference with the President the House Committee on Interstate Commerce took up a consideration of the Pomerene law and reported the same favorably to the House, with some amendments which the House passed unanimously The Senate concurred in these amendments and the bill went to the President and was signed by him August 29, 1916 (39 Stat., 538).

Thus Congress overruled the decision by the Supreme Court of the United States in the case of Shaw vs. Railroad Company, *supra*, and enacted into law the usages and customs of merchants and thereby made order-notify bills of lading fully negotiable and attached to straight bills of lading some of the attributes of negotiability and made them in a sense *quasi* negotiable.

The Pomerene Act therefore has brought the law into close mutual relationship to economics.

In Luckenbach vs. McCahan Sugar Refining Co. (December 9, 1918), 248 U. S., 139, Mr. Justice Brandeis said (at p. 149) as to the transaction therein involved: "It is creditable to the ingenuity of business men that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice."

IV.

A Bill of Lading is an Instrument of Commerce.

Commerce has been defined by the Supreme Court of the United States in the case of Welton vs. State of Missouri (91 U. S., 275, 280) as follows:

> "Commerce is a term of the largest import. It comprehends intercourse, for the purpose of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different States. *The power to regulate it embraces all the instruments by which such commerce may be conducted* (italics mine). So far as some of these instruments are concerned, and some subjects which are local on their operation, it has been held that the States may provide regulations until Congress acts with reference to them; but where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all State authority."

In United States vs. Swift & Co., 122 Fed., 529, Judge Grosscup defined commerce as follows (at p. 531):

> "Commerce, briefly stated, is the sale or exchange of commodities. But that which the law looks upon as the body of commerce is not restricted to specific acts of sale or exchange. It includes the intercourse—all the initiatory and intervening acts, *instrumentalities* (italics mine) and dealings—that directly bring about the sale or exchange. Thus, though sale or exchange is a commercial act, so also is the solicitation of the drummer, whose occupation it is to bring about the sale or exchange. *Brennan vs. Titusville*, 153 U. S., 289, 14 Sup. Ct., 829, 38 L. Ed., 719. The whole transaction from initiation to culmination is commerce."

That a bill of lading is an instrument of commerce see:

Almy vs. California, 24 Howard, 169;

Fairbanks vs. United States, 181 U. S., 283, at pp. 293-4; and

Thames & Mersey Insurance Co. vs. United States, 237 U. S., 19, at p. 26.

V.

Just What a Genuine Bill of Lading is Under the Pomerene Act of August 29, 1916.

Before determining the question of the jurisdiction of Congress to punish the forgery of a fictitious bill of lading and its constitutional right so to do, it will be necessary to determine just what a genuine bill of lading is under the Pomerene Bill of Lading Law. A *genuine* bill of lading under the Pomerene Law is not the same kind of an instrument as a genuine bill of lading under the common law.

The Pomerene Bill of Lading Act (just as the uniform State Act) centers about the great question of negotiability. The Pomerene Bill of Lading Act divides bills of lading into two kinds, the straight bill of lading (Section 2) and the order-notify bill of lading (Section 3). To emphasize further this distinction it required straight bills of lading to be marked "non-negotiable" or "not negotiable" (Section 6) and then provides that the naming of a person to be notified in an order-notify bill of lading should not impair its negotiability (Section 7).

The negotiability of an order bill of lading is fully and completely stated in Section 30 of the Pomerene Bill of Lading Act. Its terms are clear and unmistakable. The central and foremost thought of the law is in harmony with the usages and customs of merchants. In view of the fact that the order bill of lading is made out to order, and in view of the fact that it usually contains a provision to notify

a certain named person (Section 7), it is known in the trade as an "order-notify bill of lading." It is more than a mere receipt for the goods; it is more than a mere contract to carry; it is a representative of the goods themselves and intended to pass freely from hand to hand as a part of the currency of the nation, and in the case of interstate and foreign commerce becomes a part of our national currency and may well be characterized as "national commodity currency."

A straight bill of lading, by the provisions of the same Section 30 of the Pomerene Bill of Lading Act, is not the straight bill of lading of the common law. It is not a mere receipt for goods; it is not a mere contract of carriage; it is in a sense quasi negotiable, its integrity being assured by the provision that it is a conclusive representation of the receipt of the goods by the carrier from the shipper warranting the consignee in absolutely relying thereon in paying for the invoice covered by the shipment when done in good faith.

Having thus brought about the great central point urged by the merchants and in harmony with the usages and customs of merchants, it was necessary that other and subsidiary provisions should be inserted in the law so as to preserve the integrity of such bills of lading. The integrity of the order bill of lading was secured by provisions as follows:

(1) By Sections 4 and 5 duplicate bills of lading were prohibited except in certain insular and isthmian and foreign commerce.

(2) By Section 11 a bill became spent when the goods were delivered thereunder, and such spent bills of lading are required to be surrendered and cancelled.

(3) Section 12 guarded against part-spent bills of lading getting into circulation by providing that in case of a delivery of part of the goods covered by such bill of lading

either the bill of lading should be surrendered and cancelled or the articles delivered thereunder should be endorsed thereon.

(4) By Section 22 the carrier was made liable for the goods which the bill of lading purported to cover, whether the carrier had received the goods or not, if the bill of lading was signed by a person whose real or apparent authority covered the signing of bills of lading. These bills were called "fictitious" when issued with no fraudulent intent. In the competition for business the practice had grown up on the part of the carriers to give to a shipper who patronized them a bill of lading in anticipation of the receipt of the goods so that such shipper could attach it to his draft and discount his draft in bank and thereby enabled the shipper to raise money for the purchase of new goods. This form of fictitious bill of lading was frequently called an "accommodation bill." Where the representative of the railroad had entered into collusion with the shipper so to do, such bills of lading were called fraudulent bills of lading.

(5) The integrity of bills of lading were likewise safeguarded by the provisions contained in Sections 20 and 21 in the Pomerene Bill of Lading Act known as the "Shippers' Load and Count."

(6) The integrity of straight bills of lading was safeguarded by the provisions of Section 22 as to the liability of the carrier to the owner who in good faith paid an invoice on the faith that the carrier had received the goods specified in the bill of lading.

(7) In addition to the civil liability as a sanction for the protection of the integrity of both straight bills of lading and order-notify bills of lading, a further sanction was provided in Section 41 which made various acts criminal and particularly made the act of forgery a crime.

The object of each and all of these sanctions was to se-

cure the integrity of both straight and order-notify bills of lading.

A bill of lading is an instrument of commerce. A bill of lading under the Pomerene Bill of Lading Act is just as much a bill of lading whether the carrier does or does not receive any goods. A bill of lading, whether a straight bill of lading or an order-notify bill of lading, becomes a binding contract to deliver the goods to a *bona fide* purchaser for value, of the order-notify bill of lading, and to the owner who pays his invoice on a straight bill of lading, whether the carrier has received his goods or not. A non-receipt of the goods does not militate against the bill of lading being a genuine bill of lading if signed by somebody on behalf of the carrier who has real or apparent authority so to do.

If a merchant in Boston goes into Virginia to take an order for a bill of goods to be shipped which he agrees to ship from Boston to Virginia, the transaction is an interstate transaction whether the Boston merchant ever fulfills the contract or not and whether he had or had not at the time or any subsequent time goods to fulfill the contract. This has been laid down by the courts in numerous cases, some of which are as follows:

Brown vs. Maryland, 12 Wheaton, 419.
Robbins vs. Shelby County Taxing District, 120 U. S., 489.
Asher vs. Texas, 128 U. S., 129.
Brennan vs. Titusville, 153 U. S., 289.
Rearick vs. Pennsylvania, 203 U. S., 507.
International Textbook Co. vs. Pigg, 217 U. S., 91.
Dozier vs. Alabama, 218 U. S., 125.
Crenshaw vs. Arkansas, 227 U. S., 389.

By the Sherman anti-trust law (26 Stat., 209) agreements in respect to prospective interstate transactions are

void if they create a monopoly or if the methods of competition are unfair, or in restraint of trade, although as yet no goods have come into existence under such agreement and no goods have yet come into existence as the result of the unfair competition.

VI.

Sanctions for the Enforcement of a Genuine Bill of Lading.

Having determined just what a genuine bill of lading is under the Pomerene Bill of Lading Act, it will now be in order to consider the question of the sanctions for the protection of the integrity of a genuine bill of lading. The penalties provided in Section 41 of the Pomerene Bill of Lading Act are not inserted merely for the purpose of imposing fines and putting people in prison, but for the purpose of preserving the integrity of genuine bills of lading and making them useful instruments of commerce.

There is no doubt that Congress has power to legislate on the subject of bills of lading in interstate and foreign commerce, because by so doing it is legislating upon interstate commerce and is legislating upon interstate commerce when it legislates in reference to instruments by which such interstate commerce is carried on. The Pomerene Bill of Lading Act has given mercantile attributes to bills of lading, both straight and order-notify which they did not have at common law.

In Walker's American Law (Eleventh Edition), p. 31, Section 9, the following is stated:

> "* * * Legal sanctions consist in the prospective pains or pleasures consequent upon violating or conforming to the laws. * * * If laws were merely recommended to the observance of the citizens as a system of salutary rules, and then left to invite obedience or not, according as their intrinsic importance should be

felt, they would be in a great measure nugatory. The social compact would add little or nothing to the restraints of a state of nature. In order, then, to give the laws a requisite efficiency, there must be something more than a moral sanction; and, accordingly, there is annexed to every law a direct sanction, which consists in this, that when a violation is judicially ascertained, the legal consequences will be enforced by the whole power of the community. * * * By entering into the social compact, the citizen has renounced the right of taking redress for injuries into his own hands; and in return for this, society has given him its pledge to redress them for him. Instead, therefore, of relying upon his own individual strength, as in a state of nature, every member of society may command, if necessary, the whole strength of that society to prevent or redress his wrongs."

Article I of the Constitution of the United States provides as follows:

"Section 8. The Congress shall have power * * *.

"* * * to regulate commerce with foreign nations and among the several States and with the Indian tribes;

* * * * * * * * * *

"* * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

In Judson on Interstate Commerce (Third Edition), it is said (at pp. 8-10):

"The Federal authority in interstate commerce is enforced not only by the power of regulation granted to Congress by the Constitution, but also by the exercise of other expressly enumerated powers of Congress, more or less directly relating to interstate commercial

intercourse. Thus the power to establish post-offices and post roads, to coin money, to establish uniform systems of bankruptcy, to grant patents for discoveries, and most important of all the taxing power, are closely associated with commercial relations and activities. *There is also what has been termed the 'co-efficient power,' the power to make all laws necessary and proper to carry into effect the foregoing powers, and all other powers vested by the Constitution, in the Government of the United States or in any department or officer thereof* (italics mine).

"The broad and comprehensive construction given to this 'co-efficient power,' in selecting measures for carrying into execution the constitutional powers of the Government has made academic rather than practical the long debated distinction between the express and implied powers of Congress. The words 'necessary and proper' are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution, but they include all proper means which are conducive or adapted to the end to be accomplished, and which in the judgment of Congress will most advantageously effect such end.

"The Federal authority in interstate commerce, as in other matters, does not rest on a mere aggregation of the enumerated powers. Although the Government of the United States is one of enumerated powers, and under the tenth amendment the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people, *it is also true that there is a national sovereignty—a national Federal State—within the scope of the enumerated powers, and the Constitution and laws of the United States are the supreme law of the land*" (italics mine).

Exercise of the co-efficient power is exemplified in many cases, a few of which are as follows:

McCullough vs. Maryland, 4 Wheaton, 316;

Legal Tender Cases, 12 Wallace, 457;

Ex parte Yarbrough, 110 U. S., 651;
Legal Tender Case, 110 U. S., 421;
United States vs. Arjona, 120 U. S., 479;
Logan vs. United States, 144 U. S., 263;
Houston & Texas Railway vs. United States, 234 U. S., 342; and
United States vs. Barnow, 239 U. S., 74.

In United States vs. Barnow, *supra*, the third proposition of the syllabus is as follows:

> "It is within the power of the United States to prohibit the false personation of its officers or the false assumption of being an officer of the United States, and legislation to that end does not interfere with, or encroach upon, the functions of the States, and so *held* as to Section 32, Criminal Code, construed in this case as including a prohibition of the false pretense of holding a non-existent office under non-existent officers of the United States Government."

The Supreme Court of the United States, in the case of Atchison, Topeka & Santa Fe Railway Co. vs. Harold, 241 U. S., 371, in speaking of the fact that Congress, having undertaken to legislate upon the subject of bills of lading in interstate commerce, that there was included therein all of the incidents thereto, said in the seventh proposition of the syllabus, as follows:

> "The principal subject of responsibility in regard to a matter within its exclusive control embraced by an Act of Congress, necessarily carries with it the incidents thereto."

We now come to an examination of the opinion of the trial judge contained in Case No. 776, October Term, 1918 (pages 48 to 52 of the printed record).

The trial court stated (at p. 50 of the printed record):

> "Counsel for defendants contend that there must be some commerce, actually existing, or at least in contemplation, to be regulated, so as to bring into exercise the power delegated to the Congress by the Constitution."

The trial judge seems to have confounded the existence of interstate commerce together with genuine instruments thereof actually regulated by Congress in the Pomerene Bill of Lading Act, and the putting of forged fictitious bills of lading on the market to the discredit of genuine instruments of interstate commerce, merely because as to such forged fictitious bills of lading there are no goods in existence which such forged fictitious bills of lading purport to cover. The position taken by the court in adopting the suggestion of counsel for defendants was begging the whole question. That there is actual national commerce, interstate and foreign, is dwelt on hereafter (*post*, p. ——) wherein it is shown that for the year 1913 the foreign commerce, both export and import, amounted to over four billion dollars and the number of tons carried by class I and class II railroads amounted to over one billion tons, or, in other words, to more than 2,000 billion pounds of freight. Each ounce of this freight was covered by bills of lading. It is estimated that approximately 23 per cent of this tonnage was intrastate commerce and 77 per cent interstate. Therefore, as to said class I and class II railroads, 1,500 billion pounds of freight were interstate covered by interstate bills of lading.

The object of Section 41 of the Pomerene Bill of Lading Act was to provide sanctions for the protection of the national commerce and its instrumentalities against forged fictitious bills of lading. If Congress has no power to pro-

tect this national commerce and these national instruments of our national commerce, then the whole line of Federal statutes providing for Federal punishment of crimes will fall to the ground. An examination of the index to the Compiled Statutes of the United States for 1916 and the U. S. Compiled Statutes for 1918 and Barnes Federal Code for 1919 will disclose many hundreds of offenses punishable by fine and imprisonment, each of said penalties being sanctions for the enforcement of national rights through national laws providing fine or imprisonment or both.

In support of his position that Congress has no power to protect the integrity of our national commerce and bills of lading as national instruments of our national commerce, the trial judge cited the case of Pollard vs. Vinton, 105 U. S., 7, at p. 8, and makes a short excerpt from the opinion (at p. 8) of Mr. Justice Miller. What Mr. Justice Miller said must be taken in conjunction with the case before him and also in conjunction with the state of the law as then administered by the Federal courts, which state of the law has been radically changed by Section 22 of the Pomerene Bill of Lading Act (39 Stat., 542). Section 22 of the Pomerene Bill of Lading Act directly overruled Pollard vs. Vinton, *supra,* and the case of Schooner Freeman vs. Buckingham, 18 How., 182, on which it rests, and the case of Grant vs. Norway, 10 C. B., 665, and Walter vs. Brewer, 11 Mass., 99, on which the case of Freeman vs. Buckingham rests, and subsequent cases by the Supreme Court of the United States which are based on said decisions by the rule of *stare decisis.*

In view of the fact that the trial judge rests his decision on Pollard vs. Vinton, *supra,* it will be necessary to see what that case was about. That that case was a case of pure agency is shown by the statement of Mr. Justice Miller (at page 12 of the report of that case), wherein he stated (and the italics are his), as follows:

"In the one before us it is a question of *pure agency* and depends solely on the power confided to the agent."

Pollard vs. Vinton, *supra,* was a case of a water carrier running between Memphis, Tenn., and Cincinnati, Ohio. Vinton was the owner of the steamboat. E. D. Cobb & Company were the general agents of Vinton for shipping purposes at Memphis, Tenn. E. D. Cobb & Company, as agents for Vinton, issued a bill of lading purporting to cover 150 bales of cotton, and this bill of lading was delivered to Dickinson, Williams & Company. As a matter of fact, the 150 bales of cotton were never received, the bill of lading being purely an accommodation bill of lading for the accommodation of Dickinson, Williams & Company. Dickinson, Williams & Company drew a draft on Pollard at New York City, payable at sight, for $5,900, to which they attached the bill of lading, duly endorsed, which Pollard took up. The trial court held that under the circumstances stated E. D. Cobb & Company were not the agents of Vinton; and that Pollard could not maintain the action against Vinton. The Supreme Court of the United States sustained this view. The report of the opinion of Mr. Justice Miller shows throughout (at pages 8, 9, 10 and 12) that the question was purely a question of agency. The court reached the conclusion that an agent whose real or apparent authority was to issue bills of lading had no power to issue a bill of lading where goods had not been received and that so to do was not within the scope of the agency and therefore the principal was not bound. This is all that was decided in that case. The court in Pollard vs. Vinton, *supra,* based its opinion on the case of Schooner Freeman vs. Buckingham, 18 How., 182. The court did not decide any question that there being admittedly interstate commerce in goods, wares and merchandise and there being admittedly instruments of such interstate commerce, Congress could not protect the said inter-

state commerce and the instruments of such interstate commerce by legal sanctions, both civil and criminal. Of course, the court did not have before it in Pollard vs. Vinton, *supra*, decided during the October Term of 1881, a bill of lading, either straight or order-notify, of the character and with the attributes specified in the Pomerene Bill of Lading Act of August 29, 1916 (39 Stat., 538), whereby said straight bills of lading were made quasi-negotiable and said order-notify bills of lading were made fully negotiable.

The case of Schooner Freeman vs. Buckingham, 18 How., 182, was decided during the December Term, 1855. This case was similar in its facts to Pollard vs. Vinton, *supra*, and was decided purely on the question of agency. The decision in Schooner Freeman vs. Buckingham, *supra* (at p. 191), was made on the authority of Grant vs. Norway, 10 C. B., 665, also 2 Eng. Law & Eq., 337, and the early American Massachusetts case of Walter vs. Brewer, 11 Mass., 99.

Grant vs. Norway, *supra*, was decided by the English Court of Common Pleas in 1851, and was a case of a water carrier, and turned purely on the question of agency.

The American Massachusetts case of Walter vs. Brewer, *supra*, was likewise a case of a water carrier, and was decided in 1814 before railroads had come into existence and solely on the question of agency.

The case of Schooner Freeman vs. Buckingham, *supra*, was the pioneer case in the Federal courts and was decided in 1855 in reference to water carriers. There has been a vast change in economic conditions since that time. At the date of that decision there were but 18,375 miles of railroad in the United States, while today there are approximately 255,640 miles of railroad in the United States. At that date the State of Michigan completed the important Sault Ste. Marie canal. As late as 1870 the tonnage through that canal amounted to but 540,000 short tons per year. It has

now grown to considerably in excess of 60,000,000 tons per year. We also have Great Lake tonnage which does not pass through the Soo Canal, and also have a tremendous increase in coastwise and foreign trade. Under the doctrine of *stare decisis* the Supreme Court of the United States has extended the doctrine first laid down in Schooner Freeman vs. Buckingham, *supra*, to railroad transportation, as illustrated by Friedlander vs. Texas Pacific Railroad, 130 U. S., 416, and subsequent cases under the same doctrine of *stare decisis*.

The States of New York, Pennsylvania, Kansas, Tennessee, Illinois and Nebraska, however, refused to accept this doctrine of agency and in a series of cases, held the carrier liable, a few of said cases being as follows:

Armour vs. Railroad Company, 65 N. Y., 111;
Bank of Batavia vs. New York, Lake Erie & Western R. R. Co., 106 N. Y., 195;
Brook vs. Railroad Company, 108 Penn., 529;
Wichita Savings Bank vs. Railroad, 20 Kansas, 519;
Watson vs. Railroad, 9 Heisk (Tenn.), 255;
Railroad vs. Larned, 103 Illinois, 293; and
Railroad vs. Bank, 10 Neb., 556.

The Supreme Courts of Massachusetts, Ohio, Louisiana, Minnesota, North Carolina, Maryland, Arkansas, Mississippi and Washington, however, under the doctrine of *stare decisis* took the same position as that of the Supreme Court of the United States and held the carrier not liable.

The States of Maryland, Alabama, Arkansas, Louisiana and Mississippi took steps to correct the law even before the promulgation of the act to make uniform the law of bills of lading in intrastate commerce.

As we have seen, the Supreme Court of Massachusetts in 1814 (before the advent of railroads) held the carrier not

liable. The Legislature of Massachusetts, however, has overthrown that case and adopted the rule of liability by adopting the act to make uniform the laws of bills of lading in intrastate commerce.

The Legislature of Ohio likewise has set aside the decisions of its Supreme Court by adopting the same act and thereby making the carrier liable.

The Legislature of Louisiana has likewise confirmed a previous overruling of its Supreme Court by the adoption of the uniform State act making the carrier liable.

Minnesota has recently adopted an act making the carriers liable although it has not yet adopted the uniform act above referred to.

The Legislature of Maryland has likewise confirmed its previous action in overthrowing the doctrine of non-liability by adopting the uniform act making the carrier liable.

It has been seen that New York likewise confirmed the rule of carriers' liability and the Legislature of that State confirmed the judicial holdings by adopting the uniform act of carriers' liability.

The Legislature of Pennsylvania has likewise confirmed the previous holdings by its courts of carriers' liability by adopting the act to make uniform the law of bills of lading.

The Legislature of Illinois has likewise confirmed its judicial decisions by adopting the uniform act making the carrier liable.

Alaska had no decisions on the subject but has adopted the uniform act making the carrier liable.

Connecticut which had no decisions on the subject has adopted the act making the carrier liable.

Idaho which had no decisions on the subject has adopted the act making the carrier liable.

Iowa which had no decisions on the subject has likewise adopted the act making the carrier liable.

Michigan which had no decisions on the subject has likewise adopted the act making the carrier liable.

New Jersey which had no decisions on the subject has likewise adopted the act making the carrier liable.

Rhode Island which had no decisions on the subject has likewise adopted the act making the carrier liable.

Vermont which had no decision on the subject has likewise adopted the act making the carrier liable.

Washington which had no decisions on the subject has likewise adopted the act making the carrier liable.

Other States have also acted by adopting the uniform State Act on Bills of Lading imposing liability.

The trial judge also stated (printed Record, pp. 50-51) as follows:

> "These bogus bills of lading were nothing but pieces of paper, fraudulently inscribed to represent a real contract between real people and the actual receipt of goods for interstate shipment. They were not receipts for goods to be shipped; they did not affect interstate commerce, directly or indirectly; they did not obstruct it or interfere with it in any manner, and had nothing whatsoever to do with it, or with any existing instrumentality of it. That they were inscribed so as to purport to relate to interstate shipments was nothing else than a fraud upon such persons as innocently took them, as collateral or otherwise. The execution of them and their use for obtaining money under false presentes was nothing other than a crime of the kind cognizable by the criminal legislation of the States, and a matter with which the Congress in the exercise of its power to regulate commerce, is not concerned."

We disagree with the trial judge singly and collectively. The trial judge says that these bills of lading were nothing but pieces of paper, but in this he is entirely wrong. They were more than mere pieces of paper. They purported

to be order-notify bills of lading fully negotiable under the Pomerene Bill of Lading Act and were not merely receipts for the goods and not a mere contract of carriage, but they were symbolic representatives of the goods described therein and were representations that the C. H. & D. Railway had received the goods and that the C. H. & D. Railway would deliver said goods upon surrender of the bill of lading duly endorsed. They were frauds on our national commerce and were used to destroy the integrity of our national commerce and the national instruments of our national commerce. They did affect interstate commerce most directly and obstructed and interfered with it and had everything to do with it. They were frauds in reference to interstate commerce and upon persons dealing with instruments of interstate commerce. It may be true that they violated State laws, but after Congress passed the Carmack Amendment to the Hepburn Act in 1906 (34 Stat., 595) and the Act of June 18, 1910 (36 Stat., 546), and particularly the Pomerene Bill of Lading Act (39 Stat., 538), the States lost jurisdiction over said interstate commerce and said instruments of interstate commerce and over sanctions to enforce said Pomerene Act to Regulate Bills of Lading and the States lost police power over interstate bills of lading, and the Congress of the United States assumed exclusive police power thereover and as Congress had assumed complete police power thereover the States lost their jurisdiction to exercise police power thereover. Atchison, Topeka & Santa Fe Railway Company vs. Harrold (June 5, 1916), 241 U. S., 371. See also Missouri, Kansas & Texas Railway Company vs. Sealy (January 7, 1919), 248 U. S., 363.

We adopt and approve as a part of our argument and refer the court to articles in the following publications:

No. 5 of Volume XVII of the Michigan Law Review for March, 1919, at page 420, article entitled "Carriers' Lia-

bility on Bills of Lading for which no Goods were Delivered —What Law Governs."

No. 5 of Volume XXXII, of the Harvard Law Review for March, 1919, pages 557-560, article entitled "Forgery of an Interstate Bill of Lading as a Federal Crime."

VII.

In Conclusion.

In view of the nature and attributes of a genuine bill of lading under the Pomerene Bill of Lading Act, it is clearly within the power of Congress to provide penal sanctions for the purpose of protecting the integrity of genuine bills of lading by punishing forgery of fictitious bills of lading. If the market is to be flooded by forged fictitious national bills of lading because the law provides no national punishment therefor, such an immoral, illegal and unmercantile practice will soon drive the genuine bill of lading out of commerce and destroy one of the most useful instrumentalities in financing not only our national business but our international business.

See 241 U. S., 371.

For every shipment there is a bill of lading, and the volume of shipments is an ever increasing one. Taking the figures for the pre-war period, the domestic merchandise exported in 1913 amounted to $2,428,506,358, and imported to $1,813,008,234; a total of approximately $4,250,000,000. The freight tonnage originating on class I and class II railroads in the United States for the year ending June 30, 1913, amounted to 1,144,840,303 tons. This tonnage, moving as it does on bills of lading, must be protected against the spurious bill of lading by appropriate sanctions, both criminal and civil.

The ever increasing value and use of bills of lading was recognized by Congress when on September 7, 1916 (39 Stat., 752-753), it amended the Federal Reserve Act by providing as follows:

> "Any member bank may accept drafts or bills of exchange drawn upon it having not more than six months to run, exclusive of days of grace, which grow out of transactions involving the importation or exportation of goods, or which grow out of transactions involving the domestic shipment of goods, *provided shipping documents conveying or securing title are attached at the time of acceptance.*"

This provision was re-enacted in the amendatory act of June 21, 1917 (40 Stat., 235).

The National Industrial Traffic League represents 300,000 shippers vitally interested in preserving the integrity of bills of lading.

Respectfully submitted,

FRANCIS B. JAMES,

Amicus Curiae on Behalf of the National Industrial Traffic League.

Washington, D. C., April 5, 1919.

Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

Nos. 776 and 777.

THE UNITED STATES OF AMERICA,
Plaintiff-in-Error,

vs.

AUGUST FERGER, THOMAS M. DUGAN and ROBERT H. RASCH,
Defendants-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR DEFENDANT-IN-ERROR.

CHARLES E. HUGHES,
JOHN C. HERMANN,
SHERMAN T. MCPHERSON,
of Counsel for Defendants-in-Error.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR DEFENDANTS-IN-ERROR.

Statement.

These are writs of error sued out by the United States under the Criminal Appeals Act of March 2, 1907 (34 Stat. 1246, c. 2564) to review the judgments of the District Court of the United States for the Southern District of Ohio, sustaining demurrers to the indictments.

The question raised and decided is the same in both cases.

The indictments were laid under Section 41 of the Act of August 29, 1916 (39 Stat. 538) relating to bills of lading in interstate and foreign commerce.

In case No. 776 (No. 1198 below) the indictment contained twenty-four counts, the odd-numbered counts charging the defendants with forging certain bills of lading, and uttering the same, and the even-numbered counts charging the defendants with negotiating the same for value with the Second National Bank of Cincinnati (Transcript pp. 48, 49).

In case No. 777 (No. 1199 below), the indictment related to the same subject matter, charging conspiracy (*Id.* p. 49).

A stipulation was made in each case, which, in accordance with its terms, was treated as a bill of particulars filed to the indictments, as follows: (*Id.* p. 58):

> "It was agreed on the part of counsel for the Government in the argument in the court below that all of the so-called bills of lading mentioned in the indictment were fictitious in that there was no actual consignor or consignee, and that they did not relate to any shipment or contemplated shipment whatsoever. The same is agreed upon here, which said agreement is to be treated by this court as a bill of particulars filed with the indictment."

The opinion of the District Court (Hollister, J., Transcript, No. 776, pp. 48-52) sustaining the demurrer was the same in both cases and hence, by stipulation, was omitted in the printing of the transcript of the record in No. 777 (*Id.* p. 59).

POINTS.

The defendants-in-error present the following points:

(1) In the present case, there was no transaction whatever in interstate commerce.

(2) No securities, contracts, receipts, or instruments of the United States are involved.

(3) No officer, agent or instrumentality of the United States is involved.

(4) The offense sought to be charged in the indictments, as construed by the District Court, is nothing but a local offense subject to the law of the State, and the transaction in question had no real or substantial relation to interstate commerce.

Argument.

FIRST.—In the present case, there was no transaction whatever in intestate commerce.

The fictitious bills of lading in question purported to be issued by the Cincinnati, Hamilton & Dayton Railway Company. They purported to describe goods, to wit, a quantity of corn, as received at Fountaintown, Indiana, from W. D. Springer, consigned to order of W. D. Springer, destination Cincinnati, Ohio, notify Ferger Grain Company of Cincinnati.

In fact, there were no shipments whatever; no receipt of goods whatever; no consignments what-

ever; no transportation or contracts for transportation. The bills of lading were not counterfeits of actual bills; they had no reference to any actual transaction.

According to the charge in the indictment, the forgery took place in the City of Cincinnati, Ohio; the bills were uttered in Cincinnati; and the bills were there negotiated to the Second National Bank of Cincinnati as collateral security for loans.

On these writs of error, in accordance with the familiar rule, the Court takes the construction placed upon the indictments by the District Court.

> *United States* v. *Miller*, 223 U. S., 599, 602;
> *United States* v. *Patten*, 226 U. S., 525, 535;
> *United States* v. *Winslow*, 227 U. S., 202, 217.

As to this construction, and the nature of the transaction involved, there is no dispute.

The District Court said (Transcript, p. 50):

> "It was agreed at the argument and assumed in the briefs of counsel that the so-called bills of lading were fictitious, in that there was no actual consignor or consignee, and that they did not relate to any shipment or contemplated shipment of corn whatsoever. This fact so agreed upon in open Court is to be read into the indictments * * *.
>
> "These bogus bills of lading were nothing but pieces of paper, fraudulently inscribed to represent a real contract between real people

and the actual receipt of goods for interstate shipment. They were not receipts for goods to be shipped; they did not affect interstate commerce, directly or indirectly; they did not obstruct it or interfere with it in any manner, and had nothing whatsoever to do with it, or with any existing instrumentality of it. That they were inscribed so as to purport to relate to interstate shipments was nothing else than a fraud upon such persons as innocently took them, as collateral or otherwise. The execution of them and their use for obtaining money under false pretenses was nothing other than a crime of the kind cognizable by the criminal legislation of the States and a matter with which the Congress, in the exercise of its power to regulate commerce, is not concerned."

It thus conclusively appears, as the underlying fact, that the Act of Congress was sought by these indictments to be applied to a case in which there was no interstate shipment and no interstate commerce.

SECOND.—No securities, contracts, receipts or instruments of the United States are here involved.

The Constitution of the United States (Art. I, sec. 8, subd. 6) authorizes Congress "to provide for the punishment of counterfeiting the securities and current coin of the United States." Under this provision, Congress has unquestioned power to punish the counterfeiting of the obligations of the

United States, however they may be described or issued.

So also, in connection with the activities of the Government, there is no question as to the power of Congress to penalize the forging or counterfeiting of Government contracts or instruments. When the Government issues a postal money order, or a postal note, or a revenue stamp, or otherwise becomes party to an engagement or obligation or instrument, the fact that there is a Federal transaction and hence a Federal interest is apparent.

It is futile, as we conceive it, for the Government to attempt to find an analogy to the present case in the counterfeiting of postage stamps or money orders or revenue stamps. Of course, there have always been statutes making it an offense to forge or counterfeit Government securities or stamps or instruments, and the explanation, and justification, of this legislation by Congress lies in the fact that they are *Government* securities, stamps or instruments.

Again, the Constitution of the United States authorizes Congress to define and punish "offenses against the law of nations" (Art. I, sec. 8, subd. 10). The counterfeiting of foreign securities, especially the counterfeiting of bank notes and bank bills issued under the authority of foreign nations, has been held to be an offense against the law of nations and thus punishable under this provision of the Constitution.

United States v. *Arjona,* 120 U. S., 479.

In the case cited, the Court was dealing with a forgery of the bank notes of the Bank of Bolivar, United States of Colombia. The statute there

under consideration (Act of May 16, 1884, c. 52, 23 Stat. 22), provided for the punishment of the forging or counterfeiting of bonds or other securities "of any foreign Government, issued or put forth under the authority of such foreign Government." It was held that this statute defined an offense against the law of nations and thus fell within the provision of the Constitution above quoted.

The *Arjona* case rests upon no other ground, and, if the Government is to be taken as suggesting the contrary, we believe that its suggestion is wholly unwarranted. This appears from the conclusion of the opinion in the *Arjona* case, in which the ground of the decision is clearly set forth. The Court said (*Id.* p. 488):

> "This statute was enacted as a means to that end, that is to say, as a means of performing a duty which had been cast on the United States by the law of nations, and it was clearly appropriate legislation for that purpose. Upon its face, therefore, it defines an offence against the law of nations as clearly as if Congress had in express terms so declared. Criminal statutes passed for enforcing and preserving the neutral relations of the United States with other nations were passed by Congress at a very early date (statutes cited). * * * These all rest on the same power of Congress that is here invoked, and it has never been supposed they were invalid because they did not expressly declare that the offences there defined were offences against the law of nations."

It is plain that in the present case we are not dealing with the counterfeiting of any securities falling within the provisions of the Constitution above mentioned, or of any securities, contracts, receipts or instruments of the United States.

THIRD.—No officer, agent or intrumentality of the United States is here involved.

No governmental agency was in any way concerned in the transactions which are the subject of these indictments. It may even be noted that the fictitious bills of lading in question bore date of August 14, 15, and 16, 1917, and the negotiation of the bills as charged in the indictments took place on August 21, 1917, before the Government had assumed or had been authorized to undertake the possession or operation of the railroads.

We are not discussing a case of a Government instrumentality, not even of a corporation organized by the United States for the purpose of performing any governmental function. The railroad in question, the Cincinnati, Hamilton & Dayton Railway Company, was a private corporation, organized under State laws, and however important its duties as carrier may be conceived to be, it is still a private corporation. The agents of the Cincinnati, Hamilton & Dayton Railway Company were private individuals—not Government officers or agents. The defendants-in-error had no relation whatever to the Government.

The fact that common carriers, engaged in interstate commerce, and the fact that contracts relating to interstate transporation, such as bills of lading, may be regarded as instrumentalities of inter-

state commerce, in no way establishes the conclusion that either the carrier or the bill of lading is an instrumentality of the United States Government. The contract of carriage—where one existed at the time of these transactions—was a private contract between a shipper and a corporation. The obligations with respect to such a contract might be defined by appropriate authority; and the performance of the contract might be subject to appropriate legislation both with respect to the carrier and the shipper. But none of these circumstances in any way could alter the fundamental fact that the transaction, although subject to regulation, was a transaction between private parties. The contract of carriage—where there was such a contract—was not a transaction with the Government. In no aspect of the present case was any Government officer, agent or instrumentality concerned in the transaction.

The inappositeness, to the present contention of the Government, of such a case as that of *United States* v. *Barnow*, 239 U. S., 74, is thus apparent. In that case, the question arose under Section 32 of the Criminal Code, which contains a prohibition against falsely assuming or pretending to be an officer of the United States or an employee, acting under the authority of the United States or any of its departments or officers. The gist of the offense lay in "the false pretense of Federal authority" which was the mischief to be cured. (*Id.* p. 78.) The criminal statute applied in the *Barnow* case was passed in the just assertion of the power of Congress to protect the officers and agencies of the United States. We have no occasion, in this case, to consider that unquestioned authority.

If these indictments are to be sustained, under the statute as applied to the undisputed facts in this case, it cannot be by reason of the presence of any governmental instrumentality of any description. Interstate commerce is an act; and, as interstate commerce, it is subject to the regulating power of Congress. But interstate commerce is not necessarily an act of the Government, or of officers or agencies or departments of the Government. And in this case there was no act of any governmental authority, either actual or simulated. The bills of lading, according to the charge, were entirely fictitious, and the persons concerned, whose activities were in any manner represented by the fictitious bills, were private persons.

FOURTH.—The offense sought to be charged in the indictments, as construed by the District Court, is nothing but a local offense subject to the law of the State, and the transactions involved had no real or substantial relation to interstate commerce.

As already stated, and as emphasized by the Government, interstate commerce is an *act*. It is, as frequently said, a "practical conception" (*Swift* v. *United States*, 196 U. S., 375, 398). Interstate commerce is not an abstraction. When Congress, through its power of regulation, is authorized to "protect" and "foster" interstate commerce, the subject described is not an intellectual concept. The transactions to be fostered or protected are actual transactions in interstate commerce.

In the present case, the charge is that one went to a bank with a piece of paper and procured money from the bank upon the faith of it. The paper purported to be a contract for the carriage of goods. There was no such shipment and the bill was wholly fictitious. The alleged security for the loan consisted of goods of which the fictitious bill of lading was a pretended evidence of title. It made not a particle of difference whether the forger wrote in *"Cleveland"* as a place of shipment or *"Fountaintown, Indiana."* The injury would have been precisely the same. To change the illustration: If one goes to a New York bank with a fictitious bill of lading purporting to represent a shipment from New York to Buffalo, no one would pretend for a moment that the forgery was punishable by Act of Congress. But because the forger writes in the paper the word "Chicago" as the destination, when, in fact, there is no shipment whatever, the crime is not different. The same injury is effected; the persons affected by it are exactly the same; the loan is precisely the same. It is, as we view it, wholly contrary to the fact and inadmissible in law to say that there is any transaction which affects interstate commerce.

If there is a shipment of goods from New York to Chicago, of course Congress may regulate the transportation. Congress can prescribe and has prescribed the form of contract which the parties shall use. Congress has annexed certain incidental obligations to the engagement. In connection with the interstate shipment the carrier acts as an interstate instrumentality and the contract itself may be regarded as an instrumentality used in the transaction of interstate business.

But when there is no shipment, and no contract, when even the interstate carrier does not act, when even the officers of the interstate carrier have no relation to the matter, and the case is one simply between a forger and a bank, we are unable to see in what way the case is taken out of the category of an ordinary local deceit.

In all the cases relied upon by the Government there was actual interstate commerce which was fostered or protected by the legislation which this Court sustained.

It is entirely true that in the *Second Employers' Liability Cases*, 223 U. S., 1, the power of Congress to fix the liability of the interstate carrier for injuries sustained by employees engaged in interstate commerce was upheld. The Act was sustained, as the Government says, because it was a measure conducing to the safety of interstate commerce, but we have yet to learn that the Act has been sustained as the exercise of the power of Congress to fix the liability for injuries sustained by those who *pretend* to be engaged in interstate commerce.

Again, it is said that the validity of the Safety Appliance Acts, as applied to interstate commerce, is unquestioned. This is certainly true, but the Safety Appliance Acts are sustained with reference to the operation of actual cars upon an actual highway of interstate commerce.

It is urged further, as was held in the *Second Employers' Liability Cases, supra*, that Congress has power to regulate the liability of the interstate carrier for injuries sustained by an interstate employee although the negligent employee inflicting the injury was engaged in intrastate commerce. That is undoubtedly true, but the hypothesis was that there was an interstate employee who was

actually injured. And it was in this sense that the effect upon interstate commerce was regarded as the criterion instead of the source of the injury.

In the case of *Southern Railway Company* v. *United States,* 222 U. S., 20, with respect to the locomotives, cars and vehicles employed in both interstate and intrastate commerce on railroads engaged in interstate commerce, the Court held that the test was with respect to the relation between the two classes of traffic, so that the safety of interstate commerce was actually involved in the requirement of the installation of the safety appliances upon the cars used upon the interstate road. The 'direct relation' to interstate commerce there found was not between one abstraction and another; it was between actual cars running on a road and in danger of collision. Similarly, in holding with respect to the Hours of Service Act that the power of Congress could not be defeated, so far as the regulation of the hours of employees engaged in interstate commerce was concerned, by commingling the duties incident to interstate and intrastate traffic, it was the hours of labor of actual interstate employees that was the subject of regulation (*Baltimore and Ohio Railroad Co.* vs. *Interstate Commerce Commission,* 221 U. S., 612). And if, as suggested in the case of *Illinois Central Railroad Co.* v. *Behrens,* 233 U. S., 473, 477, Congress may fix the liability of an interstate carrier for injuries suffered by a member of the crew in the course of his general work, whether the particular service which is being performed at the time of the injury, isolatedly considered, is in interstate or intrastate commerce, it is manifestly because there is an interstate employee who has a duty as an interstate employee and who suffers injury.

In the case of *Houston, East and West Texas Railway Company* v. *United States,* 234 U. S., 342, the order of the Interstate Commerce Commission, which was sustained, was aimed at the correction of an actual discrimination with respect to existing interstate traffic.

We are unable to understand upon what ground it can be said that the recognition of the power of Congress to regulate interstate commerce, and to do this even though by reason of interdependence intrastate transactions may be affected, furnishes any basis whatever for the conclusion that Congress may undertake to punish a purely local crime where there is no interstate commerce whatever,—no interstate shipment, no interstate bills.

We hardly think it necessary to emphasize the point that it is just as important to maintain the proper power of the States as it is to maintain the proper power of the Nation. "The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution" (*Hammer* v. *Dagenhart,* 247 U. S., 251, 275). If Congress can legislate with respect to the transaction here in question, it can, of course, oust the State of its jurisdiction to punish this alleged crime. The recognition of the power of Congress to legislate with respect to the subject matter of this particular charge necessarily involves the conclusion that the power, if Congress sees fit so to exercise it, may be exercised as an exclusive power. This is the point made by the brief filed by the *amicus curiae,* which asserts that by virtue of the Carmack Amendment (34 Stat., 395) and the Pomerene Act here in ques-

tion (39 Stat., 538), the States have lost their power over interstate bills of lading, and the conclusion is asserted that thereby the States have lost the power to punish a purely local deception when there is no interstate bill of lading. We think the *non sequitur* is apparent, and that it is highly important that the power of the State over transactions within its jurisdiction, when there is no interstate commerce, should be maintained.

In the discharge of the delicate and important duty of this Court in maintaining the limitations of State and Federal power so that neither shall encroach upon the other, it has been the cornerstone of the decisions of the Court that interstate commerce and the authority to regulate it, begins "with the actual commencement of the transfer of the property to another State" (*Coe* v. *Errol,* 116 U. S., 517; *Bacon* v. *Illinois,* 227 U. S., 504, 512; *Hammer* v. *Dagenhart,* 247 U. S., 251, 272). It is the beginning of the movement in interstate commerce which brings the transaction within the sway of the paramount authority of Congress. The jurisdiction of Congress does not attach until the movement begins and it ceases after the movement is terminated. That is, it is dependent upon the *existence* of interstate commerce.

Where there are actual goods involved, the contemplation of the owner with respect to an interstate shipment does not subject them to the authority of Congress (*Coe* v. *Errol, supra,* p. 525). And we hardly suppose it would be contended that if one cheated another within a State by saying that he was going to ship goods in interstate commerce,

when in fact he was not, it would constitute a crime punishable by Federal Law. So, when interstate commerce has been terminated, we suppose that if one obtained money within a State by falsely asserting that it had not terminated, his crime would be subject to be punished by the local jurisdistion.

If imagination, contemplation, pretense, or false assertion, can be regarded as a basis for regulatory action of Congress, when there is no interstate commerce in fact, we are at a loss to find any determinate limitation of the exercise of Federal power, or any jurisdiction which may still be regarded as assuredly belonging to the State.

We cannot but consider, with all possible respect to the Government, that there is a hopeless confusion in the use of the phrase "protection to interstate commerce" as that phrase is applied to the facts involved in the present charge. We observe:

(1) There was here no injury whatever to interstate commerce.

Upon whom was the injury inflicted? Upon shippers? There were no shippers. Upon goods in course of transportation? No goods had been shipped. Upon corporations or carriers or employees or any persons engaged in interstate commerce? These were utterly unrelated to or affected by the transaction in question.

(2) As there was no interstate commerce in the present case, the legislation is sought to be sustained—as here applied—by reference to the alleged effect upon *other* commerce transactions.

But what other *interstate commerce* transactions were affected by this transaction? The performance of the duty of carriers to accept goods for interstate shipment, and properly to transport them, was in no way impeded. The issue of proper bills of lading, according to accepted forms, in relation to all actual shipments, was not affected. The obligations of contracts of carriage were not impaired or brought into question in the slightest degree.

There was no counterfeiting of any existing bill of lading or of any existing document relating to interstate transportation.

The exercise of the power of Congress with respect to actual interstate shipments, or transportation, was not interfered with. The carrying out of the regulations imposed by the Carmack Amendment, or by the provisions of the Pomerene Act, so far as these relate to the conduct of interstate transportation, the control of actual shipments or the issue and effect of actual bills of lading, or the counterfeiting of any existing bill of lading, and the carrying out of the rules of the Interstate Commerce Commission, was in no way limited, impaired or affected by the transaction here charged. The utterance of the fictitious bills of lading in question had not the slightest relation to the movement of interstate commerce through the country.

(3) It is apparent that the only injury caused by the transaction in question *was to the bank that loaned the money on the fictitious bills.*

But the loan of money upon collateral security is *not* interstate commerce. And it makes no dif-

ference whether the collateral securities are certificates of stock or bonds or bills of lading. The transaction in obtaining a loan upon collateral security is a transaction which is domestic to the State in which it occurs. What was said by this Court with respect to the contention advanced in *Hooper* vs. *California*, 155 U. S., 648, 655, we deem to be equally applicable to the contention now made by the Government:

> "It ignores the real distinction upon which the general rule and its exceptions are based, and which consists in the difference between interstate commerce or an instrumentality thereof on the one side and the mere incidents which may attend the carrying on of such commerce on the other. This distinction has always been carefully observed, and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the States; and would exclude State control over many contracts purely domestic in their nature."

This statement was applied in the *Hooper* case to a contract for marine insurance, which is most closely connected with foreign commerce. But it was held that "the business of insurance is not commerce," and we may add that the business of loaning money within a state is not interstate commerce. There has been considerable debate

upon the question whether the business of insurance conducted between persons and corporations in different States is not interstate commerce. The question has been resolved by the repeated decisions of this Court to the contrary. But we apprehend that there is no room for debate that the procurement of a loan by an individual within the State from a bank within the same State is not interstate commerce. And the nature of the transaction is not changed by the character of the collateral security.

See

See *Nathan* v. *Louisiana*, 8 How., 73, 81;
Williams v. *Fears*, 179 U. S., 270, 278;
Ware and Leland v. *Mobile Co.*, 209 U. S., 405, 412;
N. Y. Life Insurance Co. v. *Deer Lodge Co.*, 231 U. S., 495.

In *Ware and Leland* v. *Mobile County, supra,* with respect to contracts for sales of cotton for future delivery, this Court said:

> "But how stands the present case upon the facts stipulated? The appellants are brokers who take orders and transmit them to other States for the purchase and sale of grain or cotton upon speculation. They are, in no just sense, common carriers of messages, as are the telegraph companies. For that part of the transactions, merely speculative and followed by no actual delivery, it cannot be fairly contended that such contracts are the subject of interstate commerce; and concerning such of the contracts for purchases for future delivery,

as result in actual delivery of the grain or cotton, the stipulated facts show that when the orders transmitted are received in a foreign State the property is bought in that State and there held for the purchaser. * * *

"These contracts are not, therefore, the subject of interstate commerce, any more than in the insurance cases, where the policies are ordered and delivered in another State than that of the residence and office of the company."

The contention of the Government that the negotiation of fictitious bills of lading tends to make banks unwilling to lend is in itself a far-fetched one. It is quite obvious that, however desirable it may be to protect banks from such losses, there is no actual impairment of the use of genuine bills of lading as collateral security.

But the use of such bills of lading as collateral security for the obtaining of loans is essentially a local transaction and not an interstate transaction. The fact that it may be an incident to which interstate commerce may "give rise"— as said in the *Hooper* case—does not make the obtaining of credit or loans a part of interstate commerce. And the authority of Congress to protect begins where interstate commerce begins, and the authority of the States extends to those transactions which are essentially local transactions, as, for example, in the obtaining of loans from banks upon collateral security. The protection of loans obtained within the State by the use of private contracts as collateral security, even if these contracts relate to interstate transactions, is a matter purely of local concern and within the local jurisdiction.

It is a matter of common knowledge that in a community like New York City large sums are daily loaned upon the outstanding accounts and contracts of merchants. There are lending houses which make a specialty of such business in a great mercantile community. Would it be asserted that Congress could punish false pretenses in the obtaining of such loans, because the collateral security consisted, or was represented to consist, of accounts with merchants in other States?

The business of loaning money is one thing; interstate commerce is quite another. The protection of the business of loaning money is one thing; the protection of interstate commerce, in any proper constitutional sense, is quite another.

We conceive, therefore, that the argument with respect to the faith in the security—as to the willingness of banks to advance money—is wholly fallacious, as it relates to a matter lying outside of the range of interstate commerce, and outside of the scope of the Federal authority as to interstate commerce—a matter with which it remains for the States to deal because the transaction is essentially of a local character, whatever its ulterior motive.

In this case, the interstate commerce deemed to be affected is interstate transportation. A genuine bill of lading itself is nothing but a contract for transportation, and it becomes nothing more by reason of any regulation pertaining thereto. When we pass beyond the credit given by the bank, in loaning its money, to the conduct or acts which constitute interstate commerce, we find nothing in the way of interstate commerce which is protected by the statute as it is sought to be applied in this case.

Interstate transportation, as distinguished from the loaning of money by banks, consists of the receipt, the movement and the delivery of goods. There is nothing in this application of the statute which protects the receipt, the movement of goods or the delivery of goods by carriers. The notion that the receipt or the movement or the delivery of goods by interstate carriers is at all concerned here is so obviously ill-founded that it requires no discussion. It would be fantastical, as we view it, to suggest that because banks may loan money on utterly fictitious bills of lading, there is the slightest interference with the duty of carriers to take goods for interstate shipment or with the movement of such goods in the course of interstate transportation or with their proper delivery when the interstate transportation is at an end.

If Congress, under the guise of protecting interstate commerce, can take under its regulating power all transactions in which any interstate contract, actual or fictitious, between private parties is used as collateral security, it would be necessary, as we view it, to frame entirely new definitions of Federal power.

It is submitted that the judgments should be affirmed.

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of Counsel for Defendants-in-Error.

Mr. Charles E. Hughes, with whom *Mr. John C. Hermann* and *Mr. Sherman T. McPherson* were on the brief, for defendants in error.

Mr. Francis B. James, by leave of court, filed a brief on behalf of the National Industrial Traffic League, as *amicus curiæ*.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The twenty-four counts of the indictment in this case were concerned with the commission of acts defined as criminal and punished by the 41st section of the Act of August 29, 1916, entitled, "An Act Relating to bills of lading in interstate and foreign commerce." (39 Stat. 538.)

In the first count it was charged that the accused, in violation of the section, on or about the 14th day of August, 1917, in Cincinnati, Ohio,—"did . . . feloniously, and with intent to defraud, falsely make, forge and counterfeit, and aid and assist in falsely making, forging, and counterfeiting a certain bill of lading purporting to represent goods received at Fountaintown, in the State of Indiana, for shipment to Cincinnati, in the State of Ohio, and to utter and publish and aid and assist in uttering and publishing such falsely made, forged, and counterfeited bill of lading, then and there knowing the same to be falsely made, forged, and counterfeited. . . ."

A copy of the fabricated bill of lading was reproduced in the count. It was negotiable in form, following the standard approved by the Interstate Commerce Commission (Docket No. 787, June 27, 1908). The bill acknowledged the receipt by the Cincinnati, Hamilton and Dayton Railway Company of corn in bulk at a designated place in Indiana, shipped to Cincinnati to the order of the shipper, and with directions to notify a person named. It contained all the

earmarks which would have been found in a genuine bill of lading.

The second count charged the knowing, wilful and felonious uttering of the bill of lading and, with criminal intent and knowledge, obtaining money on it from the Second National Bank of Cincinnati by using it as collateral.

These first two counts are types of the remaining twenty-two, except that the latter dealt with eleven other bills of lading as to each of which there were two counts, charging in the exact words used in the first and second counts, on the one hand the felonious fabricating and uttering of a bill of lading, and on the other hand the uttering and obtaining on the same bill of money from the Second National Bank of Cincinnati.

There was a motion to quash all the counts based upon alleged defects in pleading with which we are not concerned, and by demurrer the failure of the indictment to charge an offense was asserted on these grounds:

"First. That said act of Congress . . . approved August 29, 1916, is unconstitutional and void, especially section 41 of said act in so far as it attempts to make it a crime and punish any person who forges or counterfeits a bill of lading where no shipment from one State to another is made or intended.

"Second. That said act can only apply to bills of lading representing actual shipments of merchandise or commerce between the States. If it is intended to apply to wholly fictitious shipments, it is unconstitutional and void so far as said fictitious shipments are concerned, because the power of Congess to legislate upon this subject matter is based wholly and solely upon the commercial clause of the Constitution, and if there is no commerce, there is no jurisdiction."

The demurrer was sustained and all the counts in the indictment were dismissed. The court said:

"It was agreed at the argument and assumed in the briefs of counsel that the so-called bills of lading were fictitious, in that there was no actual consignor or consignee, and that they did not relate to any shipment or contemplated shipment of corn whatsoever. This fact so agreed upon in open court is to be read into the indictments."

Dealing with the case thus made, the court observed:

"These bogus bills of lading were nothing but pieces of paper, fraudulently inscribed to represent a real contract between real people and the actual receipt of goods for interstate shipment. . . . That they were inscribed so as to purport to relate to interstate shipments was nothing else than a fraud upon such persons as innocently took them, as collateral or otherwise. The execution of them and their use for obtaining money under false pretenses was nothing other than a crime of the kind cognizable by the criminal legislation of the States, and a matter with which the Congress, in the exercise of its power to regulate commerce, is not concerned."

And upon these premises, after reviewing what were deemed to be the controlling authorities, it was concluded that the case "must be decided in favor of the defendants, and the holding made that Congress has not the power, under the commerce clause, to prescribe a punishment under the circumstances of this case, and if the Congress has sought to do so, the attempt is futile, because without authority."

Despite the hypothetical form in which this conclusion is expressed, the context of the opinion makes it certain that, reading the facts charged in the indictment in the light of the admissions made at the argument, the court construed the section of the statute as embracing such acts and decided that as thus construed it was void for repugnancy to the Constitution.

At the outset confusion in considering the issue may result unless obscurity begotten by the form in which the

contention is stated be dispelled. Thus both in the pleadings and in the contention as summarized by the court below it is insisted that as there was and could be no commerce in a fraudulent and fictitious bill of lading, therefore the power of Congress to regulate commerce could not embrace such pretended bill. But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it. We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce (*In re Debs*, 158 U. S. 564) and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves. It would be superfluous to refer to the authorities which from the foundation of the Government have measured the exertion by Congress of its power to regulate commerce by the principle just stated, since the doctrine is elementary and is but an expression of the text of the Constitution. Art. I, § 8, clause 18. A case dealing with a somewhat different exercise of power, but affording a good illustration of the application of the principle to the subject in hand, is *First National Bank* v. *Union Trust Co.*, 244 U. S. 416.

Although some of the forms of expression used in the opinion below might serve to indicate that the error just referred to had found lodgment in the mind of the court, the context of the opinion makes it certain that such was not the case, since the court left no obscurity in its statement of the issue which it decided, saying "They [the fictitious bills of lading] did not affect interstate commerce, directly or indirectly; they did not obstruct it or interfere

with it in any manner, and had nothing whatsoever to do with it, or with any existing instrumentality of it."

This statement not only clearly and accurately shows the question decided, but also with precision and directness points out the single and simple question which we must consider and dispose of in order to determine whether the court below erred in holding that the authority of Congress to regulate commerce did not embrace the power to forbid and punish the fraudulent fabrication and use of fictitious interstate bills of lading.

That bills of lading for the movement of interstate commerce are instrumentalities of that commerce which Congress under its power to regulate commerce has the authority to deal with and provide for is too clear for anything but statement, as manifested not only by that which is concluded by prior decisions, but also by the exertion of the power by Congress. Nothing could better illustrate this latter view than do the general provisions of the act, the 41st section of which is before us. See also Act of June 29, 1906, c. 3591, § 7, 34 Stat. 584, 593; Act of June 18, 1910, c. 309, 36 Stat. 539, 546; *Almy* v. *California*, 24 How. 169; *Thames & Mersey Marine Insurance Co.* v. *United States*, 237 U. S. 19, 26; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Harold*, 241 U. S. 371, 378; *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139; *Missouri, Kansas & Texas Ry. Co.* v. *Sealy*, 248 U. S. 363. That as instrumentalities of interstate commerce, bills of lading are the efficient means of credit resorted to for the purpose of securing and fructifying the flow of a vast volume of interstate commerce upon which the commercial intercourse of the country, both domestic and foreign, largely depends, is a matter of common knowledge as to the course of business of which we may take judicial notice. Indeed, that such bills of lading and the faith and credit given to their genuineness and the value they represent are the producing and sustaining causes of the enormous number

of transactions in domestic and foreign exchange, is also so certain and well known that we may notice it without proof.

With this situation in mind the question therefore is, Was the court below right in holding that Congress had no power to prohibit and punish the fraudulent making of spurious interstate bills of lading as a means of protecting and sustaining the vast volume of interstate commerce operating and moving in reliance upon genuine bills? To state the question is to manifest the error which the court committed, unless that view is overcome by the reasoning by which the conclusion below was sought to be sustained. What was that reasoning? That the bills were but "pieces of paper, fraudulently inscribed" and "did not affect interstate commerce, directly or indirectly . . . and had nothing whatsoever to do with it, or with any existing instrumentality of it." But this rests upon the unsustainable assumption that the undoubted power which existed to regulate the instrumentality, the genuine bill, did not give any power to prevent the fraudulent and spurious imitation. It proceeds further, as we have already shown, upon the erroneous theory that the credit and confidence which sustains interstate commerce would not be impaired or weakened by the unrestrained right to fabricate and circulate spurious bills of lading apparently concerning such commerce. Nor is the situation helped by saying that as the manufacture and use of the spurious interstate commerce bills of lading were local, therefore the power to deal with them was exclusively local, since the proposition disregards the fact that the spurious bills were in the form of interstate commerce bills which in and of themselves involved the potentiality of fraud as far-reaching and all-embracing as the flow of the channels of interstate commerce in which it was contemplated the fraudulent bills would circulate. As the power to regulate the instrumentality was coextensive with interstate com-

merce, so it must be, if the authority to regulate is not to be denied, that the right to exert such authority for the purpose of guarding against the injury which would result from the making and use of spurious imitations of the instrumentality must be equally extensive.

We fail to understand the danger to the powers of government of the several States which it is suggested must arise from sustaining the validity of the provisions of the act of Congress in question. On the contrary, we are of opinion that to deny the power asserted would be to depart from the text of the Constitution and to overthrow principles of interpretation which, as we have seen, have been settled since *McCulloch* v. *Maryland*, 4 Wheat. 316, and which in application have never been deviated from.

This conclusion remains unshaken despite an examination of the decided cases cited by the court below in its opinion or which were pressed upon our attention in argument, since in our judgment they all but express the general principles of interpretation which we have applied and which are decisive against the contention of want of power in Congress which was upheld below and is here insisted upon.

It follows that the judgment below was wrong. It must therefore be reversed and the case be remanded for further proceedings in conformity with this opinion.

And it is so ordered.

MR. JUSTICE PITNEY dissents.

UNITED STATES v. FERGER ET AL. (NO. 2).

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

No. 777. Argued April 29, 1919.—Decided June 2, 1919.

Congress has power, under the commerce clause, to forbid and punish a conspiracy to forge and utter bills of lading for fictitious interstate shipments. *United States* v. *Ferger*, *ante*, 199.
256 Fed. Rep. 388, reversed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Brown, with whom *Mr. Charles H. Weston* was on the brief, for the United States.

Mr. Charles E. Hughes, with whom *Mr. John C. Hermann* and *Mr. Sherman T. McPherson* were on the brief, for defendants in error.

Mr. Francis B. James, by leave of court, filed a brief on behalf of the National Industrial Traffic League, as *amicus curiæ*.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This case is disposed of by the ruling just announced in No. 776, *ante*, 199. The indictment here was for conspiring to do the various acts charged in the previous case, that is, the fraudulent fabrication and uttering of the same fictitious bills of lading and the obtaining of money thereon by delivering the same to the Second National Bank of Cincinnati as collateral. The demurrer which was sus-